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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 216

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

CHICAGO PACKAGED FUEL COMPANY,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals, For The Seventh Circuit.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT.

Although petitioner believes that it has anticipated in the Petition for Writ of Certiorari most of the arguments of the respondent, it is respectfully submitted that the following Reply Brief may be of assistance to the Court:

1. Respondent has not denied that this case is of great importance to the railroad industry or that an important question of local law is involved in the issues of the case. Because of the confusion and injustice resulting from the conflict between the majority opinion of the Court of Appeals and the Illinois courts, this Court is respectfully urged to grant the petition.

2. The gist of Respondent's Brief is simply that the contract in the leading Illinois case of *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N.E. 2d 415 (1949) is not analogous to the contract in the case at bar or the many similar contracts used throughout the railroad industry, that the contract at issue in *Westinghouse Co.* v. *Building Corp.*, 395 Ill. 429, 70 N.E. 2d 429 (1946) is analogous and therefore that there is some support in Illinois law for the majority opinion of the Court of Appeals, and that certain cases in other jurisdictions also are analogous.

We believe it significant that respondent did not attempt to attack our analysis of the *Russell* case at pages 6 to 10 of the Petition. Respondent did state that the *Russell* case was not analogous for three reasons, but none of these reasons is cogent.

Respondent says, first, that the contract in the *Russell* case "was to perform certain work" while "the contract here is not that kind of a contract" (Resp. Br., p. 11). Inasmuch as the contract in the case at bar provided, among other things, for the construction, maintenance, operation and use of the facility and the accident arose in connection with the operation and use, respondent's first point of distinction is not accurate. Second, respondent states that in the *Russell* case the indemnification covered injuries to Russell's employees while the agreement in the instant case is not so limited (Resp. Br., p. 11). This appears to be an argument for the petitioner rather than the respondent for admittedly the contract here is broader. Finally, the fact that the claims of the injured men were settled in both cases and that the indemnity agreement is relied upon by the plaintiff in one case and the defendant in another (Resp. Br., pp. 11-12) is simply a distinction without a difference. From these attempts

to distinguish the latest Illinois case on indemnity agreements, it should be readily apparent that the leading *Russell* case is analogous to the case at bar and should have been followed by the court below.

The contract in the *Westinghouse* case referred to by respondent, which was discussed at pp. 10-11 of the Petition for Certiorari, is of course not similar to the contract in the instant case or the many other such facility-licensing contracts used throughout the railroad industry. Indeed, the Court of Appeals in its first opinion specifically pointed out that the *Westinghouse* case was distinguished in the *Russell* opinion. *Chicago & N. W. R. Co.* v. *Chicago Packaged Fuel Co.*, 7th Cir., 183 F. 2d 630, 632. Indemnification was explicitly limited in the *Westinghouse* contract to damages "arising out of any acts or omissions by the Contractor." Inasmuch as the damages admittedly did not arise out of acts of the Contractor but instead the acts of the Building Corporation, the contract was held not to be applicable, and the court held:

> "In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent. • • •
>
> It seems clear that by such language the agreement to indemnify appellant was specifically limited to acts or omissions by appellee, its agents, servants or employees. Any other construction would require the addition of words not used and add thereto conditions and terms about which the contract is silent." *Westinghouse Co.* v. *Bldg. Corp.*, 395 Ill. 429, 432-433, 70 N.E. 2d 604, 606-607.

We see no reason to discuss the cases from other jurisdictions cited by respondent or the general rule announced by them. However, in reference to this general

rule and the annotation at 175 A.L.R. 29, cited by respondent suffice it to say that the Court of Appeals was correct in stating in its first opinion that:

> "It is true that contracts indemnifying parties against losses caused by their own negligence are generally subject to strict construction, as stated by the District Court, and generally, 'where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts.' Annotation, 175 A.L.R. 10, at page 30. However, the Annotator there, at page 37, calls attention to the qualification of this strict construction rule in a number of cases where the language of the agreement was so broad as to indicate the intention of the parties that it should include negligence. And plaintiff calls our attention to such an Illinois case, *Russell, for Use of Continental Casualty Co.* v. *Shell Oil Company,* 339 Ill. App. 168, 89 N.E. 2d 415, 417, where the court held that a contract indemnifying against 'all accidents "resulting from or arising in connection with any of contractor's operations"' included indemnity against accidents caused by the indemnitee's own negligence, distinguishing the *Westinghouse* case relied upon by the District Court in its memorandum. In the *Russell* case, the court found 'force in the contention • • • "that negligence of either party does not enter into the case, because the injury to the employee • • • resulted from or arose in connection with one of the contractor's operations against which he agreed to hold defendant harmless"'." *Chicago & N. W. R. Co.* v. *Chicago Packaged Fuel Co.*, 183 F. 2d 630.

Following this opinion of the Court of Appeals, the case was tried on its merits by the District Court and the trial court found: "Patently, it was exactly this type of occurrence that the indemnity agreement was designed to meet, and defendant cannot now escape the conse-

quences of it" (R. 76; *Chicago & N. W. R. Co.* v. *Chicago Packaged Fuel Co.*, 99 F. Supp. 361, 364).

The second opinion of the Court of Appeals herein makes no reference to the above-quoted language of its first opinion and is obviously in conflict with it. The second opinion ignores the clear Illinois rule announced by the *Russell* case that negligence need not be specifically expressed in indemnity contracts in Illinois and that, indeed, negligence is not an issue where the contract indemnifies the indemnitee for all losses "arising in connection with the operations." Finally, the majority in the second opinion of the Court of Appeals takes over for itself the functions of a fact-finding tribunal and ignores the findings of the trial court without determining that such findings are clearly erroneous.

Conclusion.

For the reasons stated herein and in the Petition for a Writ of Certiorari, it is respectfully urged that the petition be granted to permit a full consideration of the important matters involved, to the end that the judgment of the Court of Appeals be reversed.

August 1952.

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